Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A&P), the Appellant herein, filed this action for a declaratory judgment and temporary and permanent injunctive relief against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi (hereinafter referred to as Mississippi), the Appellee herein. A&P alleges that Section 11 of the Mississippi State Board of Health's "Regulation Governing The Production And Sale Of Milk And Milk Products" (hereinafter referred to as Section 11), denies admis-

sion to the State of Mississippi to milk from states which have not entered into a reciprocity agreement with Mississippi. That agreement does not advance and is totally unrelated to health and sanitary considerations. Therefore, by insistence on such a requirement, Mississippi has imposed an unconstitutional burden on interstate commerce. Suit was brought before a single judge who denied A&P's request for a preliminary injunction and held that only a three-judge court had jurisdiction of the complaint. A&P further contended that it was denied equal protection of the law because other Louisiana processors were allowed to export milk to Mississippi despite Louisiana's decision not to sign a reciprocity agreement. Evidence of this disparate treatment was provided by one of Mississippi's health officers during the hearing before the single judge.

A three-judge panel was designated which rendered a judgment against A&P and this appeal followed. This Jurisdictional Statement shows that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

I. OPINIONS BELOW

The opinions of the United States District Court for the Southern District of Mississippi are unreported. Copies of the opinions and judgment for the one-judge and three-judge courts are contained in the Appendices to this Jurisdictional Statement.

II. JURISDICTION

This suit was brought pursuant to Sections 1331 and 2201 of Title 28 of the United States Code. The three-judge court rendered its opinion on October 28, 1974, denying the requested relief. 28 U.S.C. §2281. Judgment was entered on November 13, 1974, and A&P filed its Notice of Appeal on December 11, 1974. A direct appeal to this Court from the decision of the three-judge court is authorized by 28 U.S.C. §1253.

III. STATE REGULATION INVOLVED

Section 4560-14 of the Mississippi Code of 1942, as amended, authorizes the Mississippi State Board of Health to enact regulations of state-wide force concerning the safety and wholesomeness of milk and milk products sold in the state. Pursuant to that authority, in 1967 the Mississippi State Board of Health enacted Section 11 as follows:

> Section 11. MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF ROUTINE INSPECTION
>
> Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90

percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, *and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis.* . . . (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11, emphasis added.)

IV. QUESTIONS PRESENTED

May the State of Mississippi, consistent with the Commerce Clause of the United States Constitution, deny A&P the right to export into Mississippi from its Louisiana facility milk fully satisfying Mississippi's health standards solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi? A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A&P, unconstitutionally deprives A&P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

V. STATEMENT OF THE CASE

A&P processes milk and other dairy products at its Kentwood, Louisiana plant for delivery to its retail stores in Louisiana and Mississippi. Much of the raw milk processed at the plant comes from Mississippi producers.

The investment in the Kentwood plant was made specifically in anticipation of exporting processed

milk into A&P's retail stores in Mississippi. A&P's investment in the Kentwood plant exceeds one million dollars and throughout much of these proceedings A&P has suffered actual irreparable losses of up to $2,500.00 per week because of the refusal of Mississippi officials to allow milk from the Kentwood plant into Mississippi.

A&P has complied fully with all health related requirements of the Mississippi Regulation, within the meaning of Section 11. The Kentwood plant received a 100% score on an inspection conducted by the Louisiana Department of Health in 1972 and a 98% score on a 1973 inspection. Nowhere has it been asserted that milk processed at A&P's Kentwood plant fails to meet the health standards imposed on processors in the State of Mississippi or those standards which are imposed on Louisiana processors that currently are distributing milk in Mississippi.

The sole reason milk from the Kentwood plant has not been accepted in Mississippi is that the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi. Mississippi offers to accept imported milk meeting Louisiana standards (but not necessarily meeting Mississippi standards) if Louisiana will reciprocate. But, Section 11 does not stop there. Instead of merely refusing to waive its own standards when Louisiana refuses to do so, Mississippi goes further and totally bans importation of milk from states not having reciprocity agreements *regardless* of the milk's quality. As a result, Louisiana milk is rejected by Mississippi even though it meets (or exceeds) exactly the same standards required of Mississippi milk.

Furthermore, for reasons not explained, Mississippi does accept milk from Louisiana processors such as Borden Co., Franklinton; Borden Co., New Orleans; Sealtest Dairy Products, New Orleans; and Superbrand Dairy Products, New Orleans; which were importing milk into Mississippi prior to the adoption of Section 11 in 1967. These Louisiana processors are allowed to export milk to Mississippi without a reciprocity agreement, *and* without additional inspection to that performed by Louisiana officials.

Appellant filed suit in the United States District Court for the Southern District of Mississippi seeking a judgment declaring Section 11 unconstitutional as violative of the Commerce Clause of the Constitution and requesting an injunction barring Mississippi from enforcing that Section. Proceedings were brought before a single judge because Section 11 appeared to be patently unconstitutional. *Bailey v. Patterson*, 369 U.S. 31 (1962). Thereafter, the Honorable Dan M. Russell, Jr. concluded that consideration of Section 11 must await convention of a three-judge court. Appellant filed an amended complaint praying for a statutory three-judge court which was then constituted by the Chief Judge of the Fifth Circuit Court of Appeals.

The three-judge court denied declaratory and injunctive relief to A&P and sustained the constitutionality of Section 11. Judgment was entered, and A&P filed its Notice of Appeal to the Supreme Court.

VI. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Must the burden on interstate commerce which Section 11 imposes be tolerated?

Despite the lengthy and sometimes tortuous history of this proceeding, the facts are simply put. Mississippi, through its unquestioned police power to do so, has passed a sanitary code which includes a section on the importation of milk into Mississippi. The regulation establishes two requirements: (1) the out-of-state milk must be processed under regulations substantially equivalent to Mississippi's Regulation (which contains detailed health standards), and (2) the exporting state must have signed a reciprocity agreement with the State of Mississippi. The first requirement, which serves to protect the health and safety of Mississippi residents, is constitutional. The second requirement, which conditions the right of A&P to engage in interstate commerce upon some action by Louisiana, is not.

A state may not burden the free flow of interstate commerce. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). However, a state may, on a non-discriminatory basis, enact reasonable legislation under its police power to protect the health and safety of its citizens even though that legislation incidentally burdens the free flow of interstate commerce. *California v. Thompson*, 313 U.S. 108, 113 (1941); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). But the enacting state

must justify this burden on commerce by demonstrating that the legislation is designed to protect the safety, health, or welfare of its citizens. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1934). Protecting the economic welfare of state businessmen from foreign competition or insuring the access of state businessmen to foreign markets under the guise of publishing safety and health measures is not a legitimate exercise of a state's police power. *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1951); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

Here, the requirement that out-of-state milk be processed under regulations equal or substantially equivalent to the Mississippi health standards is undoubtedly valid. A&P makes no claim that that portion of Section 11 is not. To the contrary, A&P implores Mississippi health officials to determine whether A&P milk meets those standards and, if it does, to allow that milk to be shipped into Mississippi.

Mississippi refuses entrance for the exclusive reason that the State of Louisiana has not agreed to the reciprocity provision that the State of Mississippi demands. The necessary tendency of that provision is either to protect Mississippi's markets for local processors or, open foreign markets for local businessmen should Mississippi admit foreign milk. Upon either basis the requirement is repugnant to the Commerce Clause. *Hood v. DuMond, supra.*

A careful analysis of the actual effect of the Mississippi reciprocity rule demonstrates the artlessness of Mississippi's argument that the rule is intended to insure the wholesomeness of imported milk. The

reciprocity agreement permits Mississippi to *waive* its requirements if Louisiana will waive its standards for imported Mississippi milk. Since Mississippi argues earnestly that its health standards are stricter than those imposed in Louisiana, the result of the reciprocity rule would be to *lower* the standards for imported milk if the exporting state will agree to a political arrangement desired by the State of Mississippi. Any contention that this reciprocity provision, allowing *lower* milk standards, ensures a sanitary supply of milk is frivolous.

On the other hand, if Louisiana's milk is processed under standards more stringent than those in current effect in Mississippi, Mississippi's insistence on a reciprocity agreement (with the consequent right to export milk to Louisiana) and Louisiana's accession would result in less healthful milk for Louisiana citizens. In either case, the regulation creates an overt and substantial obstruction to the free flow of interstate commerce.

Reciprocity may be a laudable goal. Reciprocity, by eliminating hyper-technical standards peculiar to one state, may aid the free flow of milk.[1] But Mississippi

1 Of course, this will not be true in all cases. For example, in this case the effect of the reciprocity clause is to ban all interstate shipments of milk from Louisiana to Mississippi without regard to the quality of that milk.

has no power to make such rules. The Constitution entrusts Congress alone with that power. *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1960); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 400 (1960).

In defense of the Regulation Mississippi argued that cases have held that a state may extend privileges to citizens of another state only if that state agrees to extend similar privileges to its citizens. That is true, but those cases deal with privileges not constituional rights. While Mississippi may condition privileges on reciprocity, it cannot condition the exercise of constitutional rights (interstate commerce) on the action of some other state. The Commerce Clause of the Consitution demands that Mississippi allow interstate competition on a nondiscriminatory basis. *Polar Ice Cream & Creamery Co. v. Andrews*, *supra*.

It is clearly within the power of the State of Mississippi to condition waiver of its stricter milk health standards for imported milk on the agreement of the exporting state to do likewise. In effect, Mississippi is merely granting the importer the privilege of importing milk that does not meet the Mississippi standards, while meeting its own state's standards, but only if the exporting state will reciprocate. If the exporting state refuses to reciprocate, then Mississippi can refuse to extend this privilege, and insist that the out-of-state milk meet Mississippi's own, stricter standards. But where there is no reciprocity agreement, Mississippi cannot *totally* ban the importation of milk from the uncooperative state even though that milk meets the standards required of Mississippi milk.

Mississippi cannot defend Section 11 by arguing that the Louisiana practice[2] is invalid, and by further arguing that Mississippi will not abide by the Constitution unless Louisiana first agrees to. The Appellant is A&P, not Louisiana. A&P has no control over Louisiana or what regulations that state adopts. A&P brought suit against *Mississippi*, and it is that state which should be enjoined from acting unconstitutionally.

Does Mississippi's decision to reject A&P's milk while accepting milk from other Louisiana processors violate the guarantee of equal protection of the law?

In deciding whether or not a state regulation violates the Equal Protection Clause of the Fourteenth Amendment, a court must select between two standards in testing the regulation under assault. The ordinary test is whether the regulation is rationally suited to achieve a lawful objective of the state. *McGowan v. Maryland*, 366 U.S. 420 (1961). The other and harder test is to be applied only when fundamental liberty is threatened or the state has established what has been termed a "suspect" classification, such as race, in a regulation. Under this latter test, the par-

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2 Louisiana allows all milk meeting its standards to be sold in the state regardless of its origin and without insistence on requirements unrelated to health.

ticular law must be adjudged more than rationally related to a legitimate state purpose; there must be a compelling state interest to justify it. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Even measured by the more lenient standard, as matters of economic importance usually are, Section 11, as applied, violates the Fourteenth Amendment.

Mississippi allows the importation of milk from at least four Louisiana dairies even though that milk does not meet the Mississippi standards and Louisiana has not signed a reciprocity agreement. Mississippi offers no justification for this anomaly. Reliance upon the fact that those processors were exporting before 1967 has been suggested occasionally as the reason for this discrimination. However, at no time has Mississippi proffered any state legislative act to permit such "grandfather" treatment.

More importantly, no rational basis, associated with protection of a wholesome supply of milk, could be advanced. Louisiana milk, supposedly inferior to Mississippi's milk, is being consumed in Mississippi without that state's inspection. This practice is further evidence that the real aim and exclusive effect of the reciprocity rule is not health; but, rather, is a protectionist scheme for the economic well-being of Mississippi dairy processors.

VII. CONCLUSION

For the foregoing reasons, it is apparent that a substantial judicial question is presented concerning the constitutionality of Section 11. If the decision is allowed to stand it would not only burden, but also would constitute an absolute ban on interstate commerce in milk and milk products between Louisiana (and possibly other states) and Mississippi.

This Court should note probable jurisdiction and grant plenary consideration through briefing and oral argument on the merits. Alternatively, an order should be entered summarily reversing the decision of the court below.

Respectfully submitted

/s/ Samuel Lang

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CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1975, by certified mail, return receipt requested, postage prepaid, mailed three copies of the foregoing Jurisdictional Statement to Mr. A. F. Summer, Attorney General, State of Mississippi, New Capitol Building, Jackson, Mississippi and to Mr. Heber A. Ladner, Jr., Suite 1638, Capital Towers, Jackson, Mississippi.

/s/ Samuel Lang

APPENDIX A

United States District Court
Southern District of Mississippi
Jackson Division

THE GREAT ATLANTIC & PACIFIC CO.,
Plaintiff

versus C.A. No. 72J-212(R)

H. B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,
Defendant

OPINION OF THE COURT

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., a Maryland Corporation, has brought this action for declaratory and injunctive relief against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi. Jurisdiction is founded on 28 U.S.C.A. #1331 (federal question) and #2201 (declaratory judgment). Plaintiff operates a milk processing plant at Kentwood, Louisiana, and seeks to deliver its processed milk to retail outlets in the State of Mississippi. In order to do so, plaintiff applied to the Mississippi State Board of Health on August 28, 1972, for a permit which it claims has been denied on the sole grounds that the supervisor of the milk control program, a division of the State Board of Health, refuses to approve plaintiff's application until such time as Louisiana executes a reciprocity agreement with Mississippi pursuant to Section 11 of the Regulations

Governing the Production and Sale of Milk and Milk Products in Mississippi.

Under Section 4560-14 of the Mississippi Code of 1942, the State Board of Health is authorized to make such rules and regulations as may be necessary to carry out statutes relating to milk producers and dairies. Regulation 11 provides as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A Milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation.

Plaintiff contends that the regulation is unconstitutional in that it imposes an undue and arbitrary restriction on commerce in violation of Article 1, Section 8, Clause 5, U.S. Constitution. Defendant

contends that the regulation was adopted as a statewide regulation to open milk trade with all other states, that its effect is to lower trade barriers, and that it is necessary to insure the enforcement of minimum standards for milk originating out of the state.

Plaintiff seeks to declare Regulation 11 unconstitutional and to enjoin the Health Officer of the State of Mississippi, his agents and employees from excluding plaintiff from delivering and selling milk in Mississippi by virtue of the refusal of the State of Louisiana to enter into a reciprocal agreement with the State of Mississippi pursuant to Regulation 11.

At a hearing on plaintiff's motion for a preliminary injunction seeking only the injunctive relief above referred to, plaintiff attached to its motion the affidavit of its vice-president and general manager of the New Orleans Division. He stated that of 105 dairy farms from which plaintiff purchases raw milk for processing at its Kentwood plant, 99 are located in the State of Mississippi; that plaintiff operates 38 supermarkets in the State of Mississippi, paying and collecting large amounts of taxes; and that plaintiff has an annual payroll of $4,000,000.00, paid to 1700 store employees, all residents of Mississippi. Attached to this affidavit are copies of two inspection reports made of the Kentwood plant. One, on a Department of Health, Education and Welfare, Public Health Service, Food and Drug Administration form, reveals the results of an inspection made on January 26, 1972, submitted by Raleigh J. Richard, Head, Division of Milk & Dairy Products. The other appears to be from Dr. James T. Perrett, Director, East Baton Rouge

Parish Health Unit to the same Raleigh J. Richard, Division of Milk & Dairy Products, reporting the results of an inspection of the same date.[1] Also attached to the affidavit are copies of correspondence, one a letter from Ramson K. Vidrine, M.D., State Health Officer, Louisiana State Department of Health to plaintiff, dated August 22, 1972, in which Vidrine confirmed that Louisiana had entered into no reciprocity agreements with any state, and that his office was not receiving any processed milk from Mississippi "because the milk does not meet our standards." The letter further stated that the Louisiana standards are above those set by the U.S. Department of Public Health and that the Louisiana standards are applied uniformly to intra-state and out-of-state producers and processors. The remaining correspondence consisted of two letters to plaintiff from Clinton Van Devender, Supervisor of the Milk Control Department of the Mississippi State Board of Health, dated September 5 and 18, 1972, respectively, setting out his department's requirements before plaintiff's plant and its products could be certified as complying with the Mississippi State Board of Health Regulations. One of these requirements is a "Certification of Reciprocity" to be executed by the appropriate Louisiana official.

At a hearing, defendant offered the testimony of Mr. Van Devender in rebuttal to plaintiff's affidavits and exhibits. Van Devender said that plaintiff was in the process of completing the Mississippi requirements, but had not submitted a reciprocity certificate as required by Regulation 11. He explained that the reason for the reciprocity agreement is that, in its absence,

1 It is not shown whether Richard is a state or federal official.

Mississippi officials have no way of knowing whether the Kenner plant meets minimum Mississippi health standards or not. He stated that on a reciprocal basis each state would accept the validity of the other's inspection. He conceded that he had seen the inspection made of the Kenner plant reported on the HEW form and that the plant and its processed milk would be acceptable to Mississippi, provided a reciprocity agreement was obtained from Louisiana. He further stated that his office has no legislative or any other kind of authority to make inspections outside the state. Lastly he identified a list of states with which Mississippi does have reciprocity agreements, including some plants in Alabama and Louisiana where milk was being sold in Mississippi before the Regulations were adopted in 1967.

Plaintiff relies primarily on *Baldwin v. Seelig, Inc.*, 294 U.S. 511, and its progeny, holding that a state, by law or regulation, cannot prescribe economic sanctions against the importation of milk from another state. Plaintiff also cites language from *Polar Co. v. Andrews*, 375 U.S. 361, at page 377: ". . . the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the . . . (its) milk industry from competition from other States."

The reason, however, for Mississippi's barrier against the importation of milk from Kentwood, is not an economic barrier but is based on the necessity of assuring its citizens that the Kentwood plant's processed milk meets Mississippi's health standards, clearly within a state's police powers, even though this requirement may cause some interference with

free trade. This argument, however, loses its efficacy if Mississippi officials are handily furnished Louisiana inspection reports such as that made on the HEW forms. The evidence is totally lacking in this regard.

Be that as it may, this Court cannot declare the unconstitutionality of Regulation 11. For that a three-judge court is required.

As to the request for a preliminary injunction, the Court is of the opinion that such relief should be denied. Plaintiff has shown no irreparable harm. Although plaintiff contends its Kentwood plant was completed in late 1971 in anticipation of a Mississippi market, it has not shown that such a market exists. In weighing the factor of an anticipated market against the defendant's contention that it has no way of inspecting the Kentwood plant except through a reciprocal agreement, this Court is loath to grant any preliminary relief until the entire matter can be considered by a three-judge court.

An appropriate order may be submitted denying the preliminary injunction. The Court suggests that the complaint be amended to request a three-judge court or it will be subject to dismissal.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

DATED: Nov. 22, 1972

APPENDIX B

(Number and Title Omitted)

(1) Requesting Judge: Honorable Dan M. Russell, Jr.
Southern District of Mississippi

(2) District Judge: Honorable William Harold Cox
Southern District of Mississippi

(3) Circuit Judge: Honorable James P. Coleman

(4) Date of Order: February 28, 1973

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge

rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge Panel either preliminarily or on the trial of the mertis, or otherwise, as that Court thinks appropriate.

/s/ JOHN R. BROWN
JOHN R. BROWN
Chief Judge Fifth Circuit

APPENDIX C

(Number and Title Omitted)

Before COLEMAN, Circuit Judge, and RUSSELL and COX, District Judges.

OPINION OF THE COURT

Plaintiff, The Great Atlantic & Pacific Tea Company, Inc., a Maryland corporation doing business in both the States of Louisiana and Mississippi, filed the above styled action against Hugh B. Cottrell, M.D., the chief health officer for the State of Mississippi, seek-

ing a declaratory judgment voiding Section 11 of the "Regulation Governing the Production and Sale of Milk and Milk Products" adopted by the Mississippi State Board of Health on December 14, 1967, and injunctive relief restraining and enjoining the named defendant and his subordinates from excluding plaintiff from doing business in Mississippi pursuant to said Section 11. Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 2201. Plaintiff, also called A & P, is engaged in the processing of fluid milk at its Kentwood, Louisiana, plant, for delivery to its retail stores in Louisiana and Mississippi. Plaintiff alleges that the defendant, charged with enforcing Section 11 of the Mississippi regulations, refuses to permit the entry into Mississippi of plaintiff's milk in the absence of a reciprocity agreement between Mississippi and Louisiana, and that, accordingly, Section 11 is unconstitutional in that it imposes an undue and arbitrary restriction on the free flow of commerce between the states, in violation of Article I, Section 8, Clause 3 of the U.S. Constitution. The defendant contends that Section 11 not only does not constitute a barrier to interstate commerce, but actually was adopted to open the milk trade with all other states; that its effect is to lower trade restrictions; and that the reciprocity clause is necessary to insure the enforcement of minimum health standards for milk originating out of the state. This Court finds that Section 11, including the reciprocal clause, is constitutional on its face presenting no barriers to trade between Mississippi and such states a s agree to reciprocity of inspection standards.

Prior to a full hearing on the merits, the undersigned, managing Judge denied a preliminary injunction in the absence of a three-judge Court to consider the constitutionality of Section 10, said section being a part of regulations of statewide import, and for the reason that plaintiff had failed to present evidence of irreparable harm in the absence of relief. The Court's findings appear of record in an opinion of November 22, 1972, unreported.

A three-judge Court, having been duly designated, has received evidence, consisting of lengthy stipulations of facts and exhibits thereto. At the conclusion of the evidence and oral argument, the Court requested both parties, by brief, to explore the possibility of joining the State of Louisiana as an indispensable party. Such briefs, as well as trial briefs, have been submitted.

The parties and the Court agree that the State of Louisiana is not subject to process under the Federal Rules of Civil Procedure, Rule 4, nor is its chief health official. In this connection defendant contends that plaintiff has standing to institute a suit similar to the instant action in the federal courts of Louisiana which may then be consolidated with this action under the rules for multi-district legislation, or that this Court can coercively require that step by dismissing this suit until plaintiff institutes a companion suit in Louisiana. Plaintiff argues that relief can be accorded without representation by Louisiana and without prejudice to that state. The Court agrees and finds that neither the State of Louisiana nor its chief health official is an indispensable party under Rule 19, and that

this Court can arrive at a complete adjudication on the merits of this action in the absence of Louisiana or its appropriate official as a party.

Stipulations of Facts

The parties introduced into the record a Stipulation of Facts to which are appended various documents, and an Amended Stipulation, also with appended documents. The facts are accepted by the Court as true and are digested as follows:

A & P is engaged in the processing of dairy products at its Kentwood, Louisiana, plant for delivery to its retail stores. The plant now supplies A & P grocery stores in the Louisiana market. A & P has been seeking a permit to enter the Mississippi market in order to supply its 38 retail outlets in Mississippi, on which it pays large amounts of taxes to Mississippi. A & P employs 1700 Mississippi residents in these outlets with an annual payroll of over $4,000,000.00. In an affidavit attached to the first stipulation, J. Y. Brashear, Vice President and General Manager, New Orleans Division of A & P, stated that of the 105 dairy farms from which A & P purchases raw milk for processing at the Kentwood plant, 99 are located in the State of Mississippi. Plaintiff's Kentwood processing plant received an inspection according to Louisiana quality and sanitation standards by the Louisiana Department of Health, Division of Milk and Dairy Products, on January 26, 1972, which yielded scores as follows: plant — 100%; producer — 94.86%; and pasteurized milk — 97.43%. By the amended stipulation, a more recent inspection in 1973 revealed the following scores:

plant — 98%; producer — 93.62%; and pasteurized milk — 95.80%. The defendant is charged with enforcing Section 11 of the Mississippi State Board of Health "Regulation Governing the Production and Sale of Milk and Milk Products," the entire section being as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the State of Mississippi or its police jurisdiction, may be sold in the State of Mississippi or its police jurisdiction, provided they are produced, pasteurized and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation."

Plaintiff has requested from defendant a permit to deliver its milk processed in the Kentwood plant to its stores in Mississippi. Defendant has refused to certify plaintiff on the ground that Louisiana has failed to enter into a reciprocity agreement with Mississippi. pursuant to Section 11. A letter dated September 5.

1972, from Clinton Van Devender, Supervisor, Milk Control Program, Mississippi Board of Health to an A & P official, advised that a signed "Certificate of Reciprocity" was required. The letter and a reciprocity certificate form are exhibits to the stipulation. A letter from the State Health Officer of the Louisiana Department of Health to A & P, dated August 22, 1972, an exhibit, acknowledged that no reciprocity agreement exists between Louisiana and Mississippi pertaining to reciprocal sanitation inspections regarding milk, nor with any other state. The letter also stated: "At the present we are not receiving out-of-state *processed* milk from Mississippi, . . . because the milk does not meet our standards." Further stipulated was that in the testimony of Clinton Van Devender, who testified at the preliminary hearing, Mr. Van Devender explained that the reason for the reciprocity agreement is that, in its absence, Mississippi officials have no way of knowing whether or not the Kentwood plant meets Mississippi health standards or not. He conceded that he had seen the inspection made of the Kentwood plant as reported on a Department of Health, Education and Welfare, Public Health Service, Food and Drug Administration form, and that the Kentwood plant and its processed milk would be acceptable to defendant, because the Louisiana regulations were substantially equivalent within the meaning of Section 11, and thus the only additional requirement is a reciprocity agreement from Louisiana. He also identified a list of states with which Mississippi has reciprocity agreements. Identified by asterisk are four plants in Louisiana and two plants in Alabama, whose processed milk enters into Mississippi, although Mississippi has no reciprocity

agreement with Alabama or Louisiana. The only explanation offered on the list is that these plants were moving milk into Mississippi before Section 11 was adopted. A transcript of Van Devender's testimony is attached to the stipulation in which he confirmed the above exceptions to Section 11. Further in the stipulation the parties agreed that if plaintiff complied with Section 11 by furnishing a "Certificate of Reciprocity" and *otherwise* complied with Mississippi health standards, plaintiff can market in its Mississippi retail outlets the milk processed in its Kentwood plant. (Underscoring added). The parties agreed that the difference between what plaintiff pays to processors outside the State of Mississippi for milk which plaintiff stocks in its Mississippi stores and the cost of what plaintiff can produce for itself amounts to $195,700 per annum, this statement appearing in the uncontested affidavit of plaintiff's New Orleans Division Treasurer, who also averred the presence of an actual market in Mississippi, the affidavit being attached to the stipulation.[1] The parties agreed that Mississippi officials inspect each dairy farm, milk hauler, milk plant, receiving station and transfer station whose milk or milk products are intended for human consumption within the state or its police jurisdiction in the manner prescribed in Sections 5 and 6 of the Mississippi milk regulation, these sections being an exhibit to the stipulation. The Mississippi milk and milk product quality standards appearing in Section 7 of the regulations are attached as an exhibit. Louisiana's

1 Obviously furnished in view of the earlier findings that plaintiff failed to present evidence of irreparable injury at the hearing for a preliminary injunction.

milk quality standards contained in Chapter V (Milk, Milk Products and Manufactured Milk Products Regulations) of the Sanitary Code of Louisiana are an exhibit, as well as Mississippi's Milk Plant Inspection Report and Dairy Farm Inspection Report forms, a list of sources of "Grade A Milk and Milk Products Sold in Mississippi," and an excerpt from the "Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers", published by the United States Department of Health, Education and Welfare, on April 1, 1972, containing the ratings of interstate milk shippers from Louisiana, and which reflects that the compliance rating of plaintiff's Kentwood plant in 1971 had a plant rating of 100% and a pasteurized milk rating of 98%. By a supplemental stipulation of facts, a full copy of Mississippi's "Regulation Governing the Production and Sale of Milk and Milk Products," adopted by the Mississippi State Board of Health on December 17, 1967, and all amendments thereto, is made a part of the record. Added as additional exhibits are amendments to Chapter V of Louisiana's milk regulations, a copy of the Louisiana State Department of Health "Pasteurization Plant Inspection Form' " a copy of a letter of November 14, 1973, from the head of the Louisiana Division of Milk and Dairy Products to plaintiff showing the results of a 1973 inspection of the Kentwood plant, reported above, and another excerpt from the 1973 "Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers," published by the U.S. Department of Health, dated October, 1973, reflecting the ratings of interstate milk shippers from Louisiana, including a rating of the Kentwood plant in 1972 as: plant — 100%, and pasteurized milk — 97%.

The Court has familiarized itself with the agreed to stipulations of fact, all the exhibits of record, and the parties' argument, both oral and by brief.

Plaintiff, admitting that it has no standing or power to demand that Louisiana enter into a reciprocity agreement with Mississippi, nevertheless claims that the stipulated facts show without dispute that plaintiff has fully complied with all health related requirements of the Mississippi milk regulation, and that the refusal of the Mississippi authorities to issue plaintiff a permit to distribute its processed milk from plaintiff's Kentwood plant across the state line to plaintiff's retail outlets in Mississippi, in the absence of a "Certificate of Reciprocity" executed by the appropriate Louisiana official, which certificate plaintiff, without fault, has been unable to secure, interferes with the exclusive power of the Congress "to regulate Commerce . . . . among the several States", in violation of the thus quoted Commerce Clause. Plaintiff insists that the evidence clearly establishes that defendant's insistence on a certification of reciprocity is the sine qua non, unrelated to health standards, for the admittance of plaintiff's otherwise acceptable milk, pointing to the fact that defendant concedes that it does not deny the entry of milk from four Louisiana processors which were importing milk into Mississippi prior to the adoption of Section 11, and which are permitted to continue despite the lack of certification. Plaintiff concedes that Mississippi's exercise of its police power may require that out-of-state milk processors meet Mississippi health and sanitation standards, and that Mississippi may issue regulations governing same, but that such regulations may not be

a subterfuge by which the health agency would place the state in economic isolation, relying on the concepts of law established in *Polar Co. v. Andrews*, 375 U.S. 361; *Dean Milk Co. v. City of Madison*, 340 U.S. 349; *H. P. Hood & Sons v. DuMond*, 336 U.S. 525; and *Baldwin v. Seelig, Inc.*, 294 U.S. 511. All of these cases stem from disputes between the exclusive authority of the Congress to regulate interstate commerce without interference from the states, and the federally recognized rights of a state's exercise of its police powers designed to protect the health of its citizens, particularly with regard to milk because of its nutritional importance and susceptibility to contamination.

In *Baldwin v. Seelig*, supra, the Supreme Court said: "It is the established doctrine of this court that a state may not, in any form or guise, directly burden the prosecution of interstate business." And on page 527: "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." In *Baldwin* the court considered the New York Milk Control Act of 1933 which set up a system of minimum prices to be paid by dealers to producers. A part of the Act extended protective prices to that part of the milk supply which came from other states. The Court struck down the act finding that it is one thing for a state to exact adherence by an importer to fitting standards of sanitation before his product may be sold in

the state's market, but it is a very different thing to establish a price scale for use in other states and to bar the sale unless the scale has been observed.

In *H. P. Hood & Sons, Inc. v. DuMond*, supra, a Massachusetts milk distributor applied for a license for an additional plant in New York under an agricultural marketing statute. The application was denied on the grounds that the proposed expansion would reduce the supply of milk for local markets and would result in destructive competition in a market already adequately served. The New York law was struck down on the grounds that a state may not promote its own local economic advantages by curtailing the volume of interstate commerce. Mr. Justice Jackson, writing for the Court, said: "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial." But, in referring to *Baldwin v. Seelig* as relevant to *Hood*, he further said: "In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition."

Dean Milk Co. v. Madison, supra, involved part of a city ordinance making it unlawful to sell milk unless pasteurized at a plant within five miles of the center of Madison, Wisconsin, and another section prohibiting the receipt, storage or sale of milk unless from a source of supply possessing a permit issued after inspection by Madison officials, who were expressly

relieved from inspection twenty-five miles beyond the center of the city. Mr. Justice Clark, in striking down the ordinance, said: "But this regulation, like the provision invalidated in *Baldwin v. Seelig, Inc.*, supra, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois . . . . In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonably nondiscriminatory alternatives, adequate to conserve legitimate local interests, are avilable." The Court found two reasonable and adequate alternatives, saying that if the City of Madison preferred to rely on its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost to the importing producers and processors. The second alternative grew out of the fact that the Illinois producer's milk was processed in plants inspected by the public health authorities of Chicago under the Chicago ordinance which adopted the rating standards recommended by the United States Public Health Service. In a footnote to *Dean*, Section 11 of the U.S. Public Health Service Milk Ordinance of 1939 is quoted verbatim, with the following comment from the Public Health Service Code: "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agen-

cy a rating of 90 percent or more on the basis of the Public Health Service rating method." Interestingly enough Section 11 of the Mississippi regulation, but for the reciprocal clause, is identical in every material aspect to Section 11 of the U.S. Public Health Service Ordinance.

In *Polar Co. v. Andrews*, supra, also relied on by plaintiff, citing *Baldwin v. Seelig*, supra, *Hood & Sons v. DuMond*, supra, and *Dean Milk Co. v. Madison*, supra, as controlling, held that the Florida Milk Control Act which excluded out-of-state milk from a major portion of the state's market could not be justified as an economic measure to protect the welfare of local dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. Further, the Court ruled that Florida has no power to prohibit the introduction within her territory of milk of wholesome quality acquired in another state.[2]

Defendant contends that the above referred to cases relied on by plaintiff are inapposite because the circumstances in each involved economic barriers, protectionist in design and result, and they all involved price and area discrimination which a willing out-of-state producer could not surmount by meeting other standards. With this contention, the Court agrees.

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2 It could be reasoned that the offending state here is not Mississippi but Louisiana which has refused to issue plaintiff a certificate of reciprocity, and which caused the Court's request to explore whether or not Louisiana officials could be made a party.

Also defendant insists that Section 11, both in intent and effect, creates reciprocal *standards of inspection* and not strict trade reciprocity. Attached to defendant's trial brief is a chart contrasting Louisiana's standards of inspection with those of Mississippi, the standards of both states being in evidence, which shows that the Mississippi standards are more stringent than that of Louisiana. Proceeding upon this conclusion, Mississippi, by waiving its stricter milk standards in favor of that of Louisiana, if Louisiana authorities will make the same commitment, is, by virtue of its Section 11, opening the milk trade with all other states, and for proof of this, points to the list of states with which Mississippi has reciprocal standards of inspection. This argument, of course, assumes that the Mississippi standards are stricter than those of Louisiana, despite the letter of August 22, 1972, from the Louisiana state health officer to plaintiff saying that Mississippi processed milk does not meet the standards of Louisiana. Nevertheless, the Court is satisfied that Section 11, insofar as it follows Section 11 of the U.S. Public Health Service Milk Ordinance, is a warranted exercise of Mississippi's police powers free of any constitutional infirmity. And, on its face, including the reciprocal inspection standards, Section 11 is within the permissible limits of state police powers even though it incidentally or indirectly involves or burdens interstate commerce. See *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346. The extent of the burden is found in the word "reciprocity," its ordinary meaning being "a mutual exchange of privileges." As long as Mississippi mutually exchanges standards of inspection with other states, there can be no burden on interstate trade.

The fact that Mississippi has engaged and expects to continue to engage in reciprocity militates against invalidating Section 11. The problem here arises out of the fact that Louisiana has refused reciprocal standards of inspection. The Court has all along realized that no relief can be granted against Louisiana or its health officials in their absence as parties to the suit. Under *Dixie Dairy Co. v. Chicago*, 355 F.Supp. 1351, the right of either Louisiana or Mississippi to enforce its own standards, either through inspections at the source of the processed milk, although such may require out-of-state inspections, or through reciprocal agreements is unquestioned. Although this case also holds that no state may be forced to relinquish its local police power on the basis of reciprocity, it does not hold that a state cannot insist on reciprocity in lieu of out-of-state inspections. Mississippi may still insist on compliance with its own health and sanitation standards, and it may continue to waive its requirements as provided in Section 11. Accordingly, the Court declines to find that Section 11 is unconstitutional in placing an undue burden on interstate commerce.

During the course of this hearing no explanation was offered by defendant as to why it receives processed milk from producers in Alabama and Louisiana in the absence of a reciprocity agreement with those states except that processed milk from these sources was received before the adoption of Section 11 and continues to be received. No evidence was offered that Mississippi officials inspect this milk at its out-of-state source. According to the testimony of Van Devender, Mississippi adopted the reciprocity clause

to avoid the expense of out-of-state inspections. The Court therefore assumes that Mississippi accepts the inspections and ratings of either Alabama or Louisiana officials, as the case may be. Plaintiff argues that for Mississippi to accept processed milk from four Louisiana processors without requiring a certificate of reciprocity, and, at the same time, deny plaintiff a permit in the absence of such certificate, is an unevenhanded, arbitrary action, depriving plaintiff of its right to equal protection. The Court disagrees. To rule otherwise, would be to hold that Mississippi could not, in the future, exercise its reciprocity clause with respect to processors in the States of Alabama and Louisiana. If the reciprocity clause could be said to be retaliatory in nature, the guilty party is Louisiana, not Mississippi.

An order may be submitted upholding the validity of Section 11 and dismissing plaintiff's suit. Let Court costs be taxed to the plaintiff.

/s/ JAS. P. COLEMAN
UNITED STATES CIRCUIT JUDGE

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

DATED: Oct. 28, 1974

APPENDIX D

(Number and Title Omitted)

JUDGMENT

This cause having come on for hearing before the Three Judge Court, and the Court having received evidence consisting of live testimony, stipulations, and exhibits, and having considered the briefs and arguments of counsel, the Court having considered the same and being fully advised in the premises does hereby order in conformity to the memorandum opinion of October 28, 1974.

ORDERED, ADJUDGED, AND DECREED as follows:

(1) That the Court has jurisdiction of the parties and the subject matter and is properly constituted under 28 U.S.C. 2281.

(2) That §11 of the "Regulation Governing the Production and Sale of Milk and Milk Products" adopted by the Mississippi State Board of Health on December 14, 1967, is valid and constitutional; that the regulation does not violate Article I, Section 8, Cl. 3, the Commerce Clause of the Constitution of the United States, nor does it violate the 14th Amendment.

(3) That the plaintiffs are not entitled to an injunction against §11 and that their Bill of Complaint should be dismissed with prejudice.

(4) That all costs should be taxed to the plaintiff.

ORDERED, ADJUDGED, AND DECREED, this, the 13th day of November, 1974.

/s/ JAS. P. COLEMAN
CIRCUIT JUDGE

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

APPENDIX E

In The United States District Court
For The Southern District Of Mississippi
Jackson Division

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Plaintiff

versus C.A. No. 72J-212(R)

HUGH B. COTTRELL, M.D., HEALTH OFFICER, STATE OF MISSISSIPPI,

Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Great Atlantic & Pacific Tea Company, Inc., the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the Order entered in this action in favor of Defendant on November 13, 1974. This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ HOWARD S. LINZY
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COUNSEL FOR
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TEA COMPANY, INC.

CERTIFICATE

I, Samuel Lang, one of the attorneys for The Great Atlantic & Pacific Tea Company, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 11th day of December, 1974, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the State of Mississippi, by mailing a copy in a duly addressed envelope, with postage prepaid, to Honorable A. F. Summer, Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi 39205.

2. On Hugh B. Cottrell, M.D., Health Officer, State of Mississippi, State Board of Health, Jackson, Mississippi 39205, to his attorney of record as follows:

Heber A. Ladner, Jr.
Special Assistant
Attorney General of Mississippi
Suite 1638, Capital Towers
Jackson, Mississippi 39201

It is further certified that all parties required to be served have been served.

/s/ SAMUEL LANG
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ATTORNEY FOR THE
GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-613

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,
v.
HUGH B. COTTRELL, M.D., HEALTH OFFICER STATE OF MISSISSIPPI

ORDER

UPON CONSIDERATION of the application of counsel for appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including March 13, 1975.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 28 day of January, 1975